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August 2, 2004

*Via Facsimile & Mail*

J. Antonio Barbosa, Executive Secretary
Agricultural Labor Relations Board
915 Capitol Mall, Third Floor
Sacramento, CA 95814

Dear Mr. Barbosa:

This office represents Teamsters Local 890. I am responding on behalf of Local 890 to the ALRB's revised invitation to interested parties to express their views on three specific questions arising in cases involving employer assistance in support of a decertification petition.

Before turning to a discussion of Local 890's position on the three questions, it is appropriate to state my understanding of the scope of those questions, and their interrelation.

All three are addressed to the level of employer assistance in decertification proceedings that the Agricultural Labor Relations Act should tolerate without invalidating the petition. I do not understand that the Board is concerned with independent unfair labor practices that would preclude a fair election, an attempted withdrawal of recognition, or even with isolated issues of free speech involving employer comments of preference. By the term "employer assistance," I understand the reference to be employer <u>actions</u> of one kind or another to assist in the decertification effort.

The other introductory observation that will shed light on the discussion in this letter is that the first and third questions appear to be offshoots of the same core inquiry, i.e., whether NLRB precedents addressing employer assistance in election cases should be accepted and applied by the Board in decertification cases. The Board is, of course, required to follow "applicable" decisional law of the NLRB, except in situations where the provisions of the two statutes diverge. *Cadiz v. ALRB*, 92 Cal.App.3d 365, 373-75 (1979). The relevant difference between the two statutes with which the Board appears to be concerned is that under the ALRA, an employer may neither file a petition to obtain an election to determine the status of an incumbent union, nor may it withdraw recognition from that union until formal decertification has occurred. Unlike the federal law, only employees may eliminate union representation through the procedures provided in the ALRA.

The first question in the Notice asks whether under existing standards of the two agencies, "is any level of [employer] assistance sufficient, or must the assistance be of a particular nature or scope in order to warrant the remedy of dismissing the petition?

The NLRB standard is summarized in *Eastern States Optical Co.*, 275 NLRB 371, 372 (1995):

> Thus, . . . it is unlawful for an employer to initiate a decertification petition, solicit signatures for the petition, or lend more than minimal support and approval to the securing of signatures and the filing of the petition. In addition, while an employer does not violate the Act by rendering what has been termed "ministerial aid," its actions must occur in a "situational context free of coercive conduct." In short, the essential inquiry is whether "the preparation circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." *KONO-TV Mission Telecasting*, 163 NLRB 1005, 1006 (1967) (footnotes omitted).

The NLRB has acknowledged that "[t]here is no bright line test by which to distinguish unlawful assistance from mere ministerial aid." *Fresno Bee*, 337 NLRN 1161, 1178 (2002). The NLRB has found unlawful employer assistance in decertification cases based on a supervisor's or an employee agent's circulation of decertification petitions; planting the idea of decertification in employees' minds; allowing its facilities and equipment to be used in obtaining employee signatures; drafting the petition; and obtaining legal services for the petitioning employee(s). *See Marriott In Flite Service*, 258 NLRB 755 (1981); *Silver Spur Casino*, 270 NLRB 1067 (1984); *Weiser Optical Co.*, 274 NLRB 961 (1985); *Central Washington Hospital*, 279 NLRB 60 (1986). The "ministerial aid" exception to the rule has been applied by the NLRB in situations involving an employer's referral of employees to the NLRB to answer questions about decertification procedures (*Times-Herald, Inc.*, 253 NLRB 524 (1980); providing a list of employees' names and addresses to an attorney for a decertification committee (*Consolidated Rebuilders, Inc.*, 171 NLRB 1415 (1968); and "editorial suggestions and supply[ing] readily available factual information" in filing the petition (*Eastern States Optical Co.*, 275 NLRB 371, 372 (1985).

The ALRB apparently adopts the NLRB's standard. At least ALRB cases finding unlawful employer assistance in decertification cases cite NLRB decisions, and involve analogous facts to those where the NLRB has found violations. *See e.g., Abatti Farms, Inc.*, 7 ALRB No. 36 (1981); *S&J Ranch, Inc.*, 18 ALRB No. 2 (1982). In *Peter D. Solomon, dba Cattle Valley Farms*, 9 ALRB No. 65 (1983) at pp. 7-8, however, the ALRB stressed "that an employer does not violate the Agricultural Labor Relations Act . . . by responding to employee questions or inquiries concerning their rights, including the right to decertify, or by referring employees to someone they can consult about their rights." Decisions reached under the general

rule that employer assistance is forbidden in decertification activities except for "ministerial aid" are, of course, based on the particular facts before the two boards, and are sometimes difficult to reconcile although purporting to apply the same principle. In any event, if the ALRB concludes that NLRB precedent is applicable in ARLB decertification cases, there is no indication that the "ministerial aid" exception to unlawful employer assistance should not be observed.

The third question in the revised Notice inquires about the applicability in ALRB decertification cases of NLRB precedents in RM and employer withdrawal cases. Withdrawal of recognition and the filing of RM petitions frequently occur in the context of petitions signed by employees expressing disaffection with union representation. The third question thus appears to deal directly with the issue of whether the difference in the two statutes referred to above renders NLRB precedents inapplicable in ALRB decertification proceedings.

This does not appear to be the first time the Board has dealt with this question. In *Jack or Marion Radovich*, 9 ALRB No. 45 (1983), the Board found that a speech and leaflet of the employer supporting decertification did not constitute unlawful assistance, citing NLRB precedent, and noting that "the lack of authority under the ALRA for employers to file decertification petitions does not require an analysis different from what we have followed" (at fn. 9). Member Henning, dissenting, rejected that conclusion, stating that by declining to provide for a procedure by which an employer could eliminate an incumbent union, "the California Legislature intended to limit the role of agricultural employers in elections under the ALRA" (*id.*, at p. 18). The employer comments found by the majority in that case to be protected were treated by Member Henning as disparaging to the union (". . . the Employer directed his remarks at the very issues which sparked the employees' disaffection") and therefore inconsistent with the employer's continuing bargaining obligations (*id.*, p. 21).

The views of interested parties solicited by the Board seem to me to be in major part directed to the problem which split the Board in 1983 in the *Radovich* case. If this is so, and if the Board were to conclude that the difference in the two statutes with respect to decertification renders NLRB precedent inapplicable, there is the further critical question of what governing principles the Board should apply in evaluating the legitimacy of employer participation in a decertification proceeding.

It is the view of Teamsters Local 890 that the reasoning of Member Henning in *Radovich, supra*, is persuasive. The most logical inference to be drawn from the legislature's exclusion of employers from the ALRA's process to challenge an incumbent union's representation authority is that employers are meant to be eliminated altogether from that process, at least to the extent constitutionally allowed. In *Process Supply*, 300 NLRB 756, 758 (1990), the Administrative Law Judge's decision (adopted by the NLRB) states flatly: "The law is clear that an employer must stay out of any effort to decertify an incumbent union." This observation may be somewhat inaccurate to the extent the "ministerial aid" rule exists, but it certainly is warranted under the

ALRA. In short, there is no justification for tolerating partisan activity by an employer of any nature, whether ministerial or substantive, in the ALRA's procedures for testing the continued representational rights of an incumbent organization. Employer participation of any degree cannot be justified.

Where relevant, however, considerations of free speech may override statutory preclusion of an employer's support for a decertification petition. As stated at the outset of this letter, I have understood the questions the ALRB wishes to have addressed concern employer assistance in the form of direct participatory actions, and not to include speech and/or written communications stating employer opinions. In many situations, of course, these two kinds of employer support will be intertwined. There are nonetheless differences in legal analysis between speech and action. It is Local 890's belief that the ALRA was intended, and should be enforced, to prohibit any and all actions taken by an employer in a decertification proceeding, limited only to whatever considerations of free speech that may be presented. It goes without saying, of course, that free speech does not include threats, coercion, or promises of benefits whether express or implied.

The second question included in the Revised Notice is somewhat different than those discussed above. Essentially, I understand the question to address the impact unlawful employer assistance in a decertification case should have on holding such an election in the future. The Board's decision in *Overnite Transportation*, 333 NLRB 1392 (2001) addresses this precise issue, although in a different factual setting. Nonetheless, the inquiry is the same as that alluded to in the second question, namely, at what point does the factual context become free from influences that would impede a free chose of employees as to their representation. Since the policy considerations are the same, there is no apparent reason for not applying the NLRB's criteria as "applicable" within the meaning of Section 1148 of the ALRA.

Local 890 is appreciative of the opportunity to express its views on these matters.

Very truly yours,

Duane B. Beeson

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DBB/ea

cc: Teamsters Local 890